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Fewer workers test positive for drugs

The number of workers testing positive for cocaine and marijuana at work has dropped sharply since 1988, but the abuse of prescription drugs is a growing worry for employers, according to medical-testing company Quest Diagnostics Inc.

Quest examined results of more than 125 million urine drug tests performed by its labs across the country for government and private employers between 1988 and 2012. The company's testing services identify approximately 20 commonly abused drugs, including marijuana, opiates and cocaine.

The analysis examined the annual positivity rate for employees in positions subject to certain federal safety regulations, such as truck drivers, train operators, airline and nuclear power plant workers, and those working for private companies.

Key findings from the analysis:

- The positivity rate for the combined U.S. workforce declined 74%, from 13.6% in 1988 to 3.5% in 2012.
- The positivity rate for the federally-mandated safety sensitive workforce declined by 38%, from 2.6% in 1992 to 1.6% in 2012.
- The positivity rate for the U.S. general workforce declined by 60%, from 10.3% in 1992 to 4.1% in 2012.

But more workers are testing positive for prescription drugs. Specifically:

- Positivity rates for amphetamines, including amphetamine and methamphetamine, has nearly tripled (196% higher) in the combined U.S. workforce and, in 2012, were at the highest level since 1997. The positivity rate for amphetamine itself, including prescription medications such as Adderall®, has more than doubled in the last 10 years.
- Positivity rates for prescription opiates, which include the drugs hydrocodone, hydromorphone, oxycodone and oxymorphone, have also increased steadily over the last decade – more than doubling for hydrocodone and hydromorphone and up 71% for oxycodone – reflective of national prescribing trends.

Quest also found changing positivity rates often mirrored larger developments in drug use in the U.S. For instance, a decline in the number of workers testing positive for methamphetamine observed in 2005 roughly coincided with federal and state efforts to crackdown on so-called "meth labs." These initiatives also put over-the-counter medicines – such as ephedrine and pseudoephedrine – behind the pharmacy counter.

The **Wall Street Journal** noted independent studies suggest that 65% to 80% of positive tests for amphetamine and opiate use ultimately are disregarded because the user has a valid prescription. But officials add the growing problem of painkiller addiction means employers need to be more alert to the possibility these drugs are being abused.

Another wrinkle is the rapid momentum to decriminalize and even legalize marijuana use. Colorado and Washington State are expected to reap a bonanza from sales of marijuana, and another 20 states or so are said to be eyeing full legalization, according to the **Washington Post**.

As that drug becomes legal, employers may revise their policies and reconsider the purpose of their drug-testing programs. "Ultimately, as an employer, the issue is whether people are impaired in the workplace, not whether someone smoked a joint over the weekend," Ethan Nadelmann, founder of the Drug Policy Alliance, which advocates for looser drug laws, commented to the **Wall Street Journal**.

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CASE LAW UPDATE

By Joe Austin

Mediated Settlements and Medicare

When parties reach an agreement to resolve a workers' compensation claim at a mediated settlement conference, the Industrial Commission's rules require the agreement be reduced to writing before the conference is adjourned. The parties typically sign a short memorandum at the mediation outlining the key terms of the settlement and subsequently prepare and sign a formal agreement (a "clincher") to submit to the Commission for approval. If a party fails to sign a clincher, another party can pursue a motion to enforce the settlement.

This is what happened in the case of Holmes v. Salon Automated Services. The parties reached an agreement and the memorandum provided the employer would pay the employee $250,000, in addition to funding a Medicare Set-Aside account with $19,582.37 in "seed money" and annual payments of $9247.23 for up to 18 years but "only if [the employee] is living." The employee died before the clincher had been completed, and his widow sought to enforce the agreement.

Initially, the Commission ordered the employer to pay the widow $250,000. The employer paid the amount but disputed any liability to issue any of the payments that had been designated for funding the MSA account. Noting the memorandum provided funds in the MSA account would be used for the "sole purpose of paying future medical expenses related to [the employee's] injury which would otherwise be paid for by Medicare," the Commission found there was an implicit condition the employee be living at the time the MSA account was established. The Commission concluded the employer was not obligated to make any payments to fund the MSA account.

On appeal, the Court of Appeals ruled that with respect to the annual payments the Commission was correct in denying the claim because the express condition the employee be alive at the time the payments came due had not been satisfied. However, the Court ruled the employer was obligated to pay the seed money under the terms of the mediated settlement agreement, noting (1) any funds that remained in the MSA account would pass to the employee's estate, and (2) the employer could have conditioned payment of the seed money on the employee's survival, as it had done in connection with the annual payments.

The Court's opinion does not provide any explanation for the parties' failure to complete the clincher agreement for nearly two months after the mediation, but drafting clinchers that provide for funding to establish MSA accounts tends to generate far more "drafting issues" than other clinchers. In any case, we can glean some practice pointers from the decision.

First, any memorandum of settlement that provides for funding of an MSA account should be conditioned on the employee's continued survival, or at the very least, this should be a point of negotiation.

In addition, in lieu of signing a memorandum, particularly in cases where there is any concern that a clincher will not be promptly returned by the employee or attorney, it might make sense for the employer's counsel to bring a draft clincher to mediation and make any "tweaks" at mediation. Alternatively, in situations in which it appears the parties have agreed to the terms of the settlement it would be prudent to recess the mediation without signing a memorandum, giving the parties the opportunity to draft a clincher, in order to make sure they are in agreement on all settlement terms.

Pre-approval of Attendant Care Services

In 1954, the Supreme Court ruled employers cannot be required to pay for attendant care services unless the employee has obtained approval from the Commission before the services are rendered.

In December 2011, the Court of Appeals reversed an order for an employer to pay for attendant care services in the case of Mehaffey v. Burger King because the employee did not obtain approval from the Commission before services were provided. In direct contrast, another panel of the Court filed an opinion in the case of Chandler v. Atlantic Scrap & Processing two weeks later, which affirmed an order for an employer to pay for attendant care services provided without preauthorization, on the basis that "an award of attendant care benefits . . . did not require preauthorization."

The Supreme Court has now issued rulings in both cases, indicating that due to changes in the language of the Workers' Compensation Act, an employer may be liable for attendant care services received without prior authorization.

Joe Austin is a senior attorney at Young Moore and Henderson in Raleigh. A graduate of Davidson College, he received his law degree from Wake Forest University.

President's Note

Sponsors, exhibitors welcome

There is still time and opportunity for you to be a sponsor or an exhibitor at our 2014 annual conference, scheduled for March 26-28 at Wrightsville Beach. Many of you support us year after year and we have come to think of you as a vital component of our association.

Our annual conference is an ideal forum to network with your peers and potential customers, and learn about emerging developments in workers' compensation. In addition, the conference provides valuable continuing education credits for adjusters and lawyers.

For those of you who are not familiar with our group, the North Carolina Association of Self-Insurers is proud to be the *Employers' Voice in Workers' Compensation*. The association is active before the North Carolina Industrial Commission and the General Assembly, and maintains legal counsel and a lobbyist to protect the interests of employers.

Many of North Carolina's largest employers belong to our association, along with claims professionals, rehab specialists, TPAs, surveillance professionals, and law firms. Membership is open to employers who are commercially insured but have large deductibles. We update our members through our quarterly publication, **NC Workers' Comp News**, and on our website at www.ncselfinsurers.com.

Join us at our conference for a terrific educational and social experience.

With very best wishes,

Jay Norris

Rates of serious workplace injuries vary widely by state

Rates of serious workplace injury and illness vary significantly between states—even for workers in the same industries—according to a report by Allsup, a nationwide provider of provider of Social Security and Medicare disability claim services.

States with the highest rate of workplace injuries that involve days of job transfer or restriction are:

1. Maine – 1.4 injury or illness cases with job transfer or restriction per 100 workers
2. Indiana – 1.1
3. California – 1.0
4. Connecticut, Kansas, Nevada, New Mexico, Oklahoma and Wisconsin – 0.9
5. Alabama, Iowa, Kentucky, Michigan, Missouri, Oregon, Pennsylvania, South Carolina, Tennessee and Washington – 0.8

These states all have rates higher than the national average of 0.7 injury or illness cases with job transfer or restriction per 100 workers, Allsup reports. The company used data obtained from the U.S. Department of Labor's Bureau of Labor Statistics.

The following industries have the highest rate of injuries:

- Amusement parks and arcades – 3.2 cases involving job transfer or restriction in 2011 per 100 workers
- Animal slaughtering and processing – 3.1
- Beverage manufacturing – 2.7; Foundries – 2.7
- Nursing care facilities – 2.6
- Beer, wine, and distilled alcoholic beverage merchant wholesalers – 2.4
- Motor vehicle body and trailer manufacturing – 2.3
- Hog and pig farming – 2.2; Motor vehicle manufacturing – 2.2; Community care facilities for the elderly – 2.2; Poultry and egg production – 2.2.

There may well be good reasons for varying rates of injuries among states, notes columnist Gary Belsky of Time. Some states may classify injuries more conservatively than others: a sprained toe or respiratory trouble in, say, Indiana may be tagged or treated more cautiously than in, say, Hawaii.

"The second factor, environment, refers to the real and significant differences between, say, driving a tractor in Appalachia and Iowa; big hills are a lot trickier to navigate than great plains. So some of the differences in the Allsup study are undoubtedly meaningful, while others are not," he adds.

coming up

March 26-28, 2014

NC Association of Self-Insurers' Annual Conference. — **Holiday Inn Resort, Wrightsville Beach**

April 2-4, 2014

Members-Only Forum, SC Self-Insurers' Association. — **Litchfield Beach & Golf Resort**

October 8 – 10, 2014

19th Annual NC Workers' Compensation Educational Conference. — **Raleigh Convention Center**

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www.ncselfinsurers.com

At the Commission

By Bruce Hamilton, Teague Campbell

- The Industrial Commission recently gained two new Deputy Commissioners. Christopher Cameron Loutit was sworn in as Chief Deputy Commissioner on January 3, 2014. He previously served as Administrator of the Commission. Prior to joining the Commission, Chief Deputy Commissioner Loutit was in private practice focusing on criminal law and general civil litigation. He has also previously worked for New Hanover County as a child support enforcement attorney.

- Deputy Commissioner Scott B. "Bart" Goodson also joined the Industrial Commission as a Deputy Commissioner on December 2, 2013. Deputy Commissioner Goodson previously worked as a civil trial attorney in private practice and with the attorney general's office and was a small business owner. He has been a member of both the plaintiff and defense bar. Deputy Commissioner Goodson is also a certified mediator. The Industrial Commission has proposed permanent rules that have been submitted to the North Carolina Office of Administrative Hearings, Rules Division, for publication on its website, http://www.oah.state.nc.us/rules/. These rules were proposed for adoption pursuant to Session Law 2013-294, which directed the Industrial Commission to make certain permanent rules using the time lines for temporary rules.

  The Industrial Commission will provide updates throughout the rulemaking process on the Industrial Commission's website. Should you have questions, please call Meredith Henderson at (919) 807-2575.